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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE STATE OF SOUTH CAROLINA, appellant,
v.
THE UNITED STATES.

No. 270.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLEE.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE STATE OF SOUTH CAROLINA, appellant, v. THE UNITED STATES. } No. 210.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLEE.

The question in the case is this: Can the States of the Union, in the exercise of their police power, engage in the monopolistic sale of spirituous, vinous, and malt liquors as beverages, exempt from the Federal special-license tax imposed upon persons engaged in similar occupations, pursuant to Article I, section 8, of the Federal Constitution?

The State of South Carolina sues to recover $22,840.71, the amount of the internal-revenue special tax on wholesale and retail liquor dealers paid by "State and county dispensers" from 1895 to 1903.

The findings of fact may be reduced to the following essential statements: Under the State law of December 24, 1892 (21 S. C. Stat., 62), "to prohibit the manufacture and sale of intoxicating liquors as a beverage

* * *, except as herein provided," with its subsequent amendments (e. g. and particularly, act of December 23, 1893, 21 S. C. Stat., 430), South Carolina maintains many "dispensaries" for the wholesale and retail sale of liquor. The United States has demanded and collected the usual taxes from the dispensers as liquor dealers; the dispensers have regularly filed the statutory "return" or application and obtained the customary license or special tax receipt, and the State, by warrant on its treasury or in cash, has paid the taxes; and the State alone profits from the business. The Federal law (R. S., secs. 3226–3228) prescribes certain methods of appeal to the executive for remission or repayment in proper cases of internal taxes. No application thereunder for refund has been made by the State or the dispensers In one year (1901) the profits of the State liquor business were over a half million dollars on gross sales of about two million. Notwithstanding the professed prohibition and rigid State control, as contemplated in her law, it is notorious that many private individuals are selling in competition with the State. The State applied for a trade-mark for this business under a pretext (apparently) that it was engaged in foreign trade.[a] In 1901, but not before, the State began to pay these taxes under a so-called protest.

[a] See *South Carolina* v. *Seymour* (153 U. S., 353). The law until recently permitted trade-marks for use only in commerce with foreign nations and Indian tribes, and not in interstate commerce; act of March 3, 1881, 21 Stat., 502, act of February 20, 1905, not yet published in the permanent volume.

The State scheme for purchase of supplies and sales—for wholesale and retail handling—and the "dispensary regulations" show the ordinary incidents and rules of a commercial liquor business and little more.

The Court of Claims delivered a practically unanimous opinion, Judge Wright concurring "in the conclusion, but not in all that is said." Their view was that this was the first attempt of a State to unite in one undertaking an exercise of the police power and a commercial business, the State contention resting on the principle that the dispensary system is an exercise of its police power beyond the interference of the General Government, which has no constitutional power to tax the administrative agencies of a State government. But the court thought that, allowing full scope to the police power and the right to prohibit or regulate the sale of intoxicants, here the State proceeds further, into the domain of private commercial business which is subject to a tax authorized by the Constitution and imposed by statute; that the police power extends no further than the general welfare, which is one thing, while exemption from taxation is another. It was held that this case does not fall within the rule exempting State agencies of government from Federal taxation, because this is an excise and not a tax, and exemption would benefit only the purchaser of liquor; because the dispensary operations are intrinsically business and not government, and being business are subject to the same national tax which is borne by all other persons engaged in the same business; because,

regarding the inconveniences and consequences of the logic, a State pursuing this policy could claim to be relieved of import duties, or, choosing to manufacture, could escape the distiller's tax. The State has the right to exercise its police power to use untrammeled all proper instrumentalities of government to enter into commercial business for profit; but "none of these rights can be exercised as an evasion of the National Government's right to impose an excise tax and to subject all persons, whether State or private corporations or individual dealers, to the same law." And the court found no difficulty in bringing the State within the notion of a "person" or "corporation," which terms "are broad enough in statutory construction to include the corporate side of a government or municipality. * * * The exemptions of sovereignty extend no further than the attributes of sovereignty."

The important provisions of the State law of 1892 are as follows:

Section 1 provides that the manufacture, sale, etc., of intoxicating liquors within the State shall be regulated and conducted as provided by this act. By section 2 the governor is authorized to appoint a commissioner,

> who shall, under such rules and regulations as may be made by the State board of control, purchase all intoxicating liquors for lawful sale in this State, giving preference to manufacturers and brewers doing business in this State, and

> furnish the same to such persons as may be designated as dispensers thereof, to be sold as hereinafter prescribed in this act. * * * He shall not sell to the county dispensers any intoxicating or fermented liquors except such as have been tested by the chemist of the South Carolina College and declared to be pure and unadulterated. * * * The State commissioner shall not receive from said county dispensers for such liquors sold to them more than 50 per cent above the net cost thereof, and all amounts so received by him from said sales shall be by him paid over to the treasury of the State monthly * * * and the State treasurer shall keep a separate account with said fund, from which the commissioner shall draw, from time to time, upon warrants duly approved by the said board, the amount necessary to pay the expenses incurred in conducting the business of said agency.

Section 5 forbids the purchase of liquors by county dispensers from anyone other than the State commissioner, and the sale of liquors other than those so purchased. By section 6 county dispensers alone are allowed to sell and dispense liquors, and it is provided that manufacturers of liquors doing business in the State shall sell to no person in the State except to the State commissioners and to parties outside of the State. Section 10 provides that "all profits, after paying all expenses of the county dispensary, shall be paid one-half to the county treasury and one-half to the municipal corporation in which it may be located; such set-

tlements to be made monthly." Section 25 provides as follows:

> No person shall knowingly bring into this State, or knowingly transport from place to place within this State * * * any intoxicating liquors with the intent to sell the same in this State in violation of law, or with intent that the same shall be sold by any other person, or to aid any other person in such sale, under a penalty of five hundred dollars and costs for each offence, and in addition thereto shall be imprisoned in the county jail for one year. * * * All such liquors intended for unlawful sale in this State may be seized in transit, and proceeded against as if it were unlawfully kept and deposited in any place. * * *

These are the essential provisions of the scheme. The act or amendment of 1893 reenacted the law with some additions and changes, which I have sufficiently discussed below. It is substantially the same plan all through the legislation. The act of 1893 did not repeal the act of 1892. The act of 1893 contains the usual and formal provision that "all acts or parts of acts inconsistent with this act are hereby repealed," but wherever a change was intended, the former law was specifically supplied, the repeal was not express and general, and the act of 1892 is the foundation of the enterprise and survives in and through the whole series of acts. If the act of 1893 "repeals" the act of 1892, then in precisely the same sense the act of 1894 (Stat. S. C., 1894, p. 721) repeals the act of 1893, the

act of 1896 (Stat. S. C., 1896, p. 123) repeals the act of 1894, and so on.

The Federal law, with its enumeration of "persons" and entities embraced, is as follows:

> SEC. 3232. No person shall be engaged in or carry on any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided.
>
> SEC. 3244. Special taxes are imposed as follows: * * * Fourth. Retail dealers in liquors shall pay twenty-five dollars. Every person who sells or offers for sale foreign or domestic distilled spirits or wines, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors. * * * Wholesale liquor dealers shall pay one hundred dollars. Every person who sells or offers for sale foreign or domestic distilled spirits or wines, in quantities of not less than five wine gallons at the same time, shall be regarded as a wholesale liquor dealer. * * *
>
> SEC. 3140. * * * Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word "person," as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person.

ARGUMENT.

I.

JURISDICTION.

The reasons on the score of jurisdiction why this claim is not good are these:

The State really paid the taxes. The applications for license, however, are signed by the dispensers as individuals, and their official relation is not disclosed further than by the use of that term, "dispenser" or "county dispenser." The State argues that it never paid or authorized payment, but its agents acted without authority. There can not, of course, be any question that the State as such and acting through her proper officers and authorities recognized her obligation to pay these taxes without demur until April 4, 1901. But if the argument is true that the State has never been assessed and has never paid the money, how can she sue to recover? If the suit is maintainable at all, should it not be brought in the names of the dispensers to the use of the State?

Again, this point, that the dispensers paid the taxes and not the State, suggests that on the assumption of payment under mutual mistake of law there can be no recovery. This principle has been ruled against claimants in a suit by private persons in *United States* v. *Edmonston* (181 U. S., 500), in which the court, by Mr. Justice Brewer, points out the strictness of the rule and the irrelevancy of discussion on equities or moral obligation, which manifestly could not be suggested here. This doctrine would appear to be appli-

cable to a case where money belonging to a State has been paid out under a mistake of law. In *Wisconsin Central Ry. Co.* v. *United States* (164 U. S., 190) it was shown that the Federal Government could not be prejudiced by the erroneous action of its officers, and certain previous excess payments by the United States were allowed as a counterclaim. If that is equally true of a State government, the force of the rule can be worked out here in favor of the State through the official bonds of dispensers, to which she has recourse.

That doctrine really does not apply here in any aspect, because the payment by the State's agents was in no conceivable sense a mistake of fact, nor was it a mistake of law. The payment was made during much of the period voluntarily, without question or cavil. The letter of the State dispensary commissioner of 1901 says that the payments are "illegally required" and "demanded" by the collector and are made only for that reason and to avoid possible conflict between Federal and State officials. There is no suggestion of "mistake" as to past or current payments.

The truth is that the opposing argument on jurisdiction is hopelessly double. It claims the right of return on the ground of mistake and by equitable principles, *ex æquo et bono*, because the money of the State was improvidently paid, and the United States should hold it in good conscience to the State's use, citing decisions in the Court of Claims and *United States* v. *Bank* (96 U. S., 30), where the money was paid to the United States by the *fraud* of an agent. How can it be said

here that the money has been unlawfully obtained by mistake of all parties? The collector did not *compel* payment in any sense other than that all persons engaged in this business must pay or refuse or neglect at their peril. The payments were conscious and deliberate; they were in all senses voluntary until the so-called protest of 1901. The point that the State can not comply with the regulations for executive refund because these contemplate an assessment which "*he*," a person, paid, etc., while the State has not been assessed and has not paid, begs the question. The argument is that although all of the State's officers joined in the application and payment without any question until this afterthought was brought forward, the State itself did not pay and yet may turn round and recover. "What was paid, it is true, was the money of the State, but it was paid by persons having no authority." The argument comes right back to the proposition that "Congress, of course, never intended the internal-revenue laws to apply to a State." The State would not yield in advance the very contention upon which she bases her claim for relief. The question is not at all like that in Fassett's case and the Insular cases. These decisions held that to follow the executive remedy the main question would have to be conceded, viz, whether the vessel was *imported* merchandise; whether the goods entering from the islands were *importations*. Here the underlying question is, of course, whether the State is at all liable to the tax on the ground that, exercising her police power, she must

be exempt. But that can not cloak the proposition that either she or her agents ought to have applied for executive refund of the money which the agents paid, whether rightly or wrongly. The State can not say that she was not assessed and did not pay, and therefore that neither she nor her agents, who did pay, ought to have applied for the refund, and then turn round and say that after all the money was hers and she is entitled to recover in the judicial forum.

Counsel are thus far right in the view that the State did not pay; the assessment was made against the dispensers selling the liquor, and they paid. The tax was one of the expenses of conducting the enterprise. The expenses have been audited and allowed by the State through all its agencies, and it is difficult to see how there can be a cause of action in the State, as such, for the money so paid.

The statutes contemplate and require (R. S., secs. 3226–3228) an appeal to the Treasury as a condition of the right to bring suit for the recovery of internal taxes alleged to have been erroneously or illegally collected. The State excuses itself for failure thus to proceed by the same argument, viz, that the State did not pay the money, with the further suggestion that if she had applied to the Treasury for refund she would have surrendered her contention that she is not within the compulsions of the internal-revenue laws. She says that certain persons, the dispensers as her agents, paid the taxes, and did so unlawfully, because they were mere agents or instrumentalities of the State,

which could not be legally assessed. But if that is true, what was to hinder these persons from making application for repayment in the manner and form provided by the statute?

So that this is the State's dilemma, founded upon her own argument: If she did not pay the money, she has no right to recover at all; if her agents paid it, either rightly for her or wrongly to her injury, then either she or they ought to have pursued the executive remedy before seeking the courts. The State stands on the argument that, in order to get before the Treasury, the State must yield in advance the very contention upon which she bases her claim for relief, viz, she is not within the provisions of the law, never was assessed and never paid any tax, which the dispensers upon illegal assessment paid with the State's money but without authority from the State. The State's attitude was thus expressed by counsel below, and it certainly appears to be inconsistent:

> The secretary has made regulations for the recovery of taxes paid by the appellant himself, while in the case at bar the State never paid nor authorized to be paid the money which it seeks to recover, nor has the State ever been assessed this tax.

If the State has not been assessed and has not paid, it is difficult to see how she can institute an action to recover back, and the case would seem to be controlled by the decision in *Nichols* v. *United States* (7 Wall., 122).

How can the Nichols case be differentiated from the case at bar, except by saying that the State is not a taxpayer and is not a person? And that again begs the question. The point decided in that case was that the statute having provided for an appeal to the Commissioner of Internal Revenue, that remedy is exclusive, and that cases arising under the revenue laws are not within the jurisdiction of the Court of Claims. The argument here is simply another *petitio principii*, viz, that the case at bar is not a revenue case, since the State is not and can not be made a taxpayer by the Federal Government.

Thus, returning to the conception of a voluntary payment, it seems clear that the jurisdictional question controls, and that there is really no constitutional question for the court to pass upon. The case must go out of court before the constitutional question is reached. In *Chesebrough* v. *United States* (192 U. S., 253, 259) the Chief Justice, delivering the opinion of the court, said:

> The rule is firmly established that taxes voluntarily paid can not be recovered back, and payments with knowledge and without compulsion are voluntary. At the same time, when taxes are paid under protest that they are being illegally exacted, or with notice that the payer contends that they are illegal and intends to institute suit to compel their repayment, a recovery in such a suit may, on occasion, be had, although generally speaking, even a protest or notice will not avail if the payment be made

voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than such payment.

II.

THE MERITS.

But neither the State nor her officers are entitled to refund in the executive or judicial forum, and there is no merit whatever in her claim in any aspect.

(A) The State is fairly covered by the language of the law.

The enumeration of those liable for the tax is "every person who carries on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, or manufacturer of stills" (sec. 3242). It is simple reason to say that the intent of the legislature is as far-reaching as the attraction of the business and includes all natural and artificial or abstract persons who choose to engage in it. The tax is imposed under the constitutional rule of uniformity. Of course it is probable that Congress never imagined that a sovereign State would choose to enter this field; but that does not signify a *casus omissus*. It seems, however, that one State undertook for a short time an experiment not precisely the same but similar, but the law was declared unconstitutional (*Beebe* v. *State*, 6 Ind.,

501; *Herman* v. *State*, 8 Ind., 545). This was before the enactment of the Federal law. A third State has made an unconstitutional attempt to embark in a different business (*Rippe* v. *Becker*, 56 Minn., 100). And the South Carolina law was first declared unconstitutional (*McCullough* v. *Brown*, 41 S. C., 220), and then sustained after the complexion of its Supreme Court had changed (*State* v. *Aiken*, 42 S. C., 222). Under such circumstances this court will not be bound by the State court's view of its law (*Gelpcke* v. *City of Dubuque*, 1 Wall., 175, 205, 206).

There are many State authorities for the proposition that a State is a corporation, and that the word "person" in a statute may include a State on its corporate and municipal side as distinguished from its sovereign character.

Martin v. *State* (24 Tex., 61); the "intent to defraud any *person*," in a statute punishing falsification of public records, embraces a State.

State of Indiana v. *Woram* (6 Hill (N. Y.), 33); a State is a corporation, may be payee of a note, and "person" includes it.

Lancaster Co. v. *Trimble* (34 Nebr., 752); a county is a person in the legal sense.

Kansas v. *Herold* (9 Kans., 194); the United States is a "person" within a statute making it an offense for any person to cut down timber, etc., "on the land of any other *person*."

Republic of Honduras v. *Soto* (112 N. Y., 310); a foreign government is a person under a law requiring a

non-resident defendant, "a person residing without this State," to give security for costs.

In *Salt Lake City* v. *Hollister* (118 U. S., 256) this court had no difficulty in determining that a municipality engaging in the manufacture and sale of liquor was subject to the special license tax of the internal-revenue laws. It is true that Utah was then a Territory, and there was no question there of the taxation of *State* instrumentalities. It is also true that there are many cases in which it has been held that the word "person" does not include a State. But all these are cases in which so to have construed the law would have been tantamount to declaring it unconstitutional, because adjudging that the Federal Government could lay a tax upon the property or legitimate instrumentalities of a State. Congress is not presumed to have passed an unconstitutional act, and therefore the word was given its primary significance and held to exclude a State. The controlling factor, as always, is the intention of the legislature; and the term "person" or "corporation" is broad enough to embrace a State, if necessary, to effect the intent of Congress. There can be no real doubt that the object of Congress was to levy this excise on the business by whomsoever carried on; I have shown that to effectuate the intent, "person" has been held to include a municipal corporation, a State, the United States, and a foreign State; and the real inquiry thus is seen to be whether the State dispensary system is a proper exercise of the State police power. If not, there can be no question that the statu-

tory language and intent covers the State; if so, the tax is unconstitutional on fundamental grounds, for the United States is then assuming to tax a proper administrative agency or instrumentality of the State.

As to opinions of Attorneys-General cited by opposing counsel, holding that the word "person" in certain provisions of internal-revenue laws does not include a State (e. g., 12 Op., 176, 277, 376, 402; 13 Op., 67, 439)—the opinion of Mr. Stanbery (12 Op., 176), holding that State bank notes were not taxable under the internal-revenue laws, has been overruled by the case of *National Bank* v. *United States* (101 U. S., 1). Other opinions exempted from Federal taxation railroads owned by a State, articles manufactured by convicts in a State penitentiary or house of correction, for the use of the State, dividends on stock owned by a State, and interest on a municipal loan. But all these objects were clearly either the property of the State or its instrumentalities, and were of course properly not taxable, and the opinions cited are therefore readily distinguishable from and can have no bearing on the present case.

The argument of the other side is that this tax falls upon the exercise of a valid police power, and that since the power to tax includes the power to destroy, the police power, like the judicial power of a State, might be destroyed by Congress under the guise of taxation if the right to tax it exists at all. On this the decisions are marshaled which hold that the United States have no power to tax either the instrumentalities

or the property of the State. That is fully conceded, but the question is, whether the instrumentality is a legitimate agency of government. The appellant invokes the principle that by no subterfuge of language or indirection can the limitation upon the taxing power be evaded. But neither can the limitation upon the police power; and here, too, the Supreme Court will reach through the form to seize the substance. The principle of the exemption from the taxing power was fully reviewed in the Income Tax cases, and the doctrine stated in this sentence:

> As the State can not tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State. (157 U. S., 429, 584.)

The limitations are also well expressed in *United States* v. *B. & O. R. R.* (17 Wall., 322), thus:

> It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress.

This case is outside the rule. It is not a power or operation of government in any true sense which the United States is taxing. The business taxed is not

a necessary agency for the legitimate purposes of State government.

The distinction may be clearly illustrated by a ruling of internal-revenue practice which counsel cites, viz, that a liquor-dealer's license, being a certificate required by the laws of a State in the exercise of government functions, comes within the exception. Of course such a document issued under State laws was relieved of Federal taxation, but the business was not, and the liquor dealer whose State license could not be taxed as a document necessarily paid the Federal special tax on his business. The internal revenue rulings have not been uniform, and would not be controlling precedents before this court; but with reference to the ruling of Mr. Delano in 1870 it is to be said that the Massachusetts law under which the town's agent was held not liable to special tax, like the Maine law, was a real measure of prohibition and only permitted sales by towns for limited purposes, medicinal and industrial.

But before pursuing the inquiry, as to a valid exercise of police power, I note the authorities which show that the exaction is not in strictness a *tax* on *person* or *property* at all, but preeminently an *excise*, the most familiar and characteristic of all; something "cut out" of the price, resting on the *sale* of the goods and paid in the last analysis by the consumer. The tax is merely an expense of the business. It is manifest, on these well-known grounds, that there has been no actual burden on the State or its property; its customers have paid

the tax, and this principle is evident when considered in connection with the fact that these taxes were charged in as expenses of the business and were so passed by the State's accounting officers. The tax may also be viewed as taking the form of an occupation tax and license, but it falls none the less within the indirect class and is as truly an excise as the charge per gallon on whisky or per hundred on cigars. The leading cases are: *Pacific Ins. Co.* v. *Soule*, 7 Wall., 433; *Veazie Bank* v. *Fenno*, 8 Wall., 533; *Scholey* v. *Rew*, 23 Wall., 331; *Nicol* v. *Ames*, 173 U. S., 509; *Knowlton* v. *Moore*, 178 U. S., 41; *Patton* v. *Brady*, 184 U. S., 608; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S., 397.

In *Nicol* v. *Ames*, where the tax was imposed under the war-revenue act of 1898 upon sales of products or merchandise at an exchange or board of trade, the court said (pp. 518, 519):

> We think the tax is in effect a duty or excise laid upon the privilege, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business. * * * It is not a tax upon the members of the exchange nor upon membership therein, nor is it a tax upon sales generally. * * * Its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise.

This language was quoted and approved in *Knowlton* v. *Moore*, deciding that an inheritance tax was not a direct tax on property, but an excise on the transmission or receipt of property, occasioned by death.

In *Patton* v. *Brady* the tax imposed by the act of June 13, 1898, on tobacco was held not to be a direct tax, but an excise; that it was not "a tax upon property as such, but upon certain kinds of property, having reference to their origin and intended use."

Upon a review of these cases in *Spreckels Sugar Refining Co.* v. *McClain* the court held that the tax imposed on the plaintiff with reference to its carrying on the business of refining sugar was a special excise tax.

(B) The Federal excise is levied pursuant to express constitutional grant of power; it is superior to the reserved police power of the States, which can not control the powers created or prohibitions imposed by the Constitution.

The grant is:

> The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States. (Art. I, sec. 8, cl. 1.)

This power of taxation is especially broad, absolute, and untrammeled; it is in no wise affected by the fact that States under their like sovereign power do or may tax the same object, activities, or rights; it includes liquor excises and license fees. (*McCulloch* v. *Maryland*, 4 Wheat., 316; *Gibbons* v. *Ogden*, 9 Wheat., 1;

License Tax Cases, 5 Wall., 462; *Pacific Ins. Co.* v. *Soule*, 7 Wall., 433; *Austin* v. *The Alderman*, 7 Wall., 694; *Veazie Bank* v. *Fenno*, 8 Wall., 533; *Knowlton* v. *Moore*, 178 U. S., 41; *The Oleomargarine Cases*, 195 U. S., 27.)

State police power is necessarily subordinate to the granted powers of the Federal Government. For instance, it is well settled that State laws of police and public welfare become inoperative so far as they interfere with the Federal power over interstate commerce.

In *Bowman* v. *Chicago and Northwestern R. Co.* there was a State prohibition law, and the court said that in the License Tax cases it was held that the States could not only regulate the sales of imported liquors, but could prohibit sales. But, further, it was said that while the States could act upon certain subjects within the commercial power of Congress until Congress intervenes with its authority, nevertheless, where the subject is national in character, requiring uniformity of regulation and affecting equally all the States, like the interstate transportation of goods, Congress alone can act and provide the needed regulation. (125 U. S., 465, 507.)

The general principle is thus laid down in *Railroad Co.* v. *Husen* (95 U. S., 465, 473–474):

> The police power of a State can not obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope can not be secured at the expense of the protection afforded by the Federal Constitution.

Before the passage of the so-called Wilson act of 1890 it was thoroughly established that it was not within the power of a State to forbid the importation of liquors from foreign countries or other States, nor their sale in original packages, nor subject the sale to discriminatory taxes or regulations. (*Walling* v. *Michigan*, 116 U. S., 446; *Leisy* v. *Hardin*, 135 U. S., 100; *Lyng* v. *Michigan*, 135 U. S., 161; *In re Rahrer*, 140 U. S., 545; *Rhodes* v. *Iowa*, 170 U. S., 412; *Vance* v. *Vandercook Co.*, 170 U. S., 438; *American Express Co.* v. *Iowa*, 196 U. S., 133.) Under the Wilson act, however (August 8, 1890, 26 Stat., 313), Congress consented, to a certain degree, that the States should regulate the introduction of liquors into their confines, by providing that intoxicating liquors, when transported from one State to another, should lose their character as interstate commerce and be subject to the operation of State laws, upon completion by delivery and before sale in the original packages; and this act was passed upon in the cases of *In re Rahrer* (140 U. S., 545) and *Rhodes* v. *Iowa* (170 U. S., 412), which held that the act was a valid exercise of the power to regulate commerce. In *Vance* v. *Vandercook Co.* (170 U. S., 438), a case coming from South Carolina, the Wilson act was again before the court, and it was held that since the passage of the act, while the right existed to receive intoxicating liquors sent from another State without regard to the State laws to the contrary, there was no right to their sale in the original packages in defiance of State law.

But this statute and the decisions under it do not affect the principle that in the absence of permissive legislation by Congress the States may not under the police power pass any law which interferes with the regulation of commerce between the States.

Take another illustration: In *New Orleans Gas Co.* v. *Louisiana Light Co.* (115 U. S., 650), it was decided that a grant by the State of an exclusive right to the gas company was a contract which could not be impaired by a subsequent constitutional provision that no monopoly should be granted and by a statutory revocation in pursuance thereof. The police power in this case yielded to a prohibition of the Constitution of the United States.

There are numerous other cases showing that a State may by contract restrict the exercise of its powers beyond the right of revocation, where exclusive grants of highway and bridge privileges have been made or exemptions from taxation have been conferred. (*Bridge Proprietors* v. *Hoboken Co.*, 1 Wall., 116; *The Binghamton Bridge*, 3 Wall., 51; *Asylum* v. *Home of the Friendless*, 8 Wall., 430; *Humphrey* v. *Pegues*, 16 Wall., 244, 248, 249; *Farrington* v. *Tennessee*, 95 U. S., 679, 689; *Asylum* v. *New Orleans*, 105 U. S., 362, 368.) Other illustrations are found in those cases in which State police power sought to deal with undesirable immigrants, and the principle was laid down that such statutes are unconstitutional whenever they conflict by their necessary operation and effect with the paramount authority of Congress. Thus, in *Henderson* v. *Mayor*

(92 U. S., 259, 271), the court, through Mr. Justice Miller, while declining to decide whether in the absence of Congressional action the States can, or how far they can, protect themselves against foreign paupers, criminals, and diseased persons, held that no definition of the police power and no urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution. (See also *Chy Lung* v. *Freeman*, 92 U. S., 275.)

The *Slaughter-house cases* (16 Wall., 36, 62) pointed out that the police power is from its nature incapable of exact definition or limitation; and in *Stone* v. *Mississippi* (101 U. S., 814, 818) it was said that it is "easier to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the power itself which will be in all respects accurate." There is a power, broad and somewhat vague, which has been called the police power, residing in the States, by virtue of which they may, within certain limits, control everything within their respective territories. Upon the proper exercise of this power under many circumstances may depend the public health, public morals, or public safety, and this is conceded in all the cases. In this broad sense the power may be said to include all legislation and almost every function of civil government, and under this conception or definition we may classify the authority of the State to create educational institutions and establish charities,

to provide for the maintenance and control of highways, ferries, and other public utilities, to carry on certain public works, like the draining of swamps. For instance, the Supreme Court of Louisiana has decided that the taking of property for building a public levee is an exercise of the police power and *damnum absque injuria*, because the State has a servitude over lands on navigable rivers for making and repairing levees, roads, and other public works. This view was recognized by this court in *Ledyard* v. *Tresevant* (160 U. S., 452).

But all definitions of the power must, as was said by Mr. Justice Harlan, speaking for the court in the case of the *New Orleans Gas Co., ut sup.*, "be taken subject to the condition that the State can not in its exercise for any purpose whatever encroach upon the powers of the General Government or rights granted or secured by the supreme law of the land."

Coming now to the bank and tax cases—in *Veazie Bank* v. *Fenno* (8 Wall., 533, 547, 549) the Federal statute enacted under the power to coin money and the power to lay and collect taxes (Art. I, sec. 8, cls. 5, 1) was attacked upon the ground that it was a tax upon a State instrumentality exercised by the State under its police power; but the court held that since the Constitution granted the power expressly any appropriate legislation was superior to the State police power, and that the particular legislation was entirely constitutional. The court said (p. 547):

> It may be admitted that the reserved rights of the States, such as the right to pass laws, to

> give effect to laws through executive action, to administer justice through the courts, and to employ all *necessary* agencies for *legitimate* purposes of State government, are not proper subjects of the taxing power of Congress. But it can not be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property, and, when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.

Is the proposition sound that the sale of intoxicating liquors for profit is one of the necessary or legitimate purposes of State government? If the State delegates authority to her citizens to sell liquor and exacts a license tax, the Federal excise must be paid before that authority or privilege may be exercised. Any franchise or privilege granted by the State is liable to Federal taxation; and yet the claim is that, because the State herself exercises the privilege that may be and often is granted to and exercised by individuals, she can stand on the reserved State powers to avoid the payment of the Federal tax.

The case of *National Bank* v. *United States* (101 U. S., 1) is precisely in point and appears to be controlling. There the United States sought to collect the 10 per cent tax on State bank notes issued during a period of years. The notes were issued and put in circulation by the city where the bank was located, and used as money in ordinary business transactions.

By a municipal ordinance, and by an act of the legislature, they were receivable in payment of dues to the municipality. The contention was made that a municipal corporation is part of the State government and is protected from Federal taxation precisely as the State itself; that the issuance and function of the circulating notes constituted an instrumentality of the State. It was sought to distinguish the case of *Veazie Bank* v. *Fenno* on the ground that there the franchise was granted to private persons and for private purposes, while in the Arkansas case the notes were evidences of debt contracted for public uses by a branch of the State government and formed a part of the debt of the State itself. But the court affirmed and applied the doctrine of *Veazie Bank* v. *Fenno*, saying (p. 6):

> The tax thus laid is not on the obligation, but on its use in a particular way. As against the United States, a State municipality has no right to put its notes in circulation as money. It may execute its obligations, but can not, against the will of Congress, make them money. * * * Such a use is against the policy of the United States. * * * The taxation was no doubt intended to destroy the use; but that, as has just been seen, Congress had the power to do.

In *McCray* v. *United States*, 195 U. S., 27 (the Oleomargarine cases), Mr. Justice White said, in answer to the contention that the oleomargarine tax was void because it was manifest that the purpose of Congress was to suppress the manufacture of the article:

> Undoubtedly, in determining whether a particular act is within a granted power, its scope

and effect are to be considered. Applying this rule to the acts assailed, it is self-evident that on their face they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power. The argument to the contrary rests on the proposition that although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.

Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise.

It is very apparent that the license tax rests, not upon the liquor itself or other property of the State, but upon the privilege of dispensing the liquor as a beverage. The person engaged in dispensing at a dispensary under the State regulations, if a private person, would undoubtedly be liable for the tax, and the official character and relation to the State do not change his character as a dealer. "The word 'dealer' is not confined to one who sells his own property only." (*United States* v. *Allen*, 38 Fed. Rep., 736.) The only real difference between the method of conducting a

dispensary and an ordinary bar-room is that a blank application must be filled out for liquor from a dispensary, and the liquor can not be drunk upon the premises; for as to the other minor restrictions relating to retail sale they are practically universal and common to all systems, such as sale on Sundays and sale to habitual drunkards. The Federal statute contains no suggestion that where such restrictions apply the character as a retail dealer is absent. The law merely provides that a retail dealer is one who sells in quantities less than 5 gallons. The fact that the dealer is the agent of the State and obtains his goods from the State can make no difference whatever under the principles shown above. If a State desires to engage in the banking business and circulate her promissory notes as money, she must pay the prohibitory tax for the privilege; and so if she desires to sell liquor as a beverage, she must pay the license tax. In both instances she is engaged in business lawfully subject to taxation by the Federal authority, and can not by invoking police power or State sovereignty set at naught the powers and functions of the Federal Government by express grant in the Constitution.

The consequences of a construction are not conclusive, yet are often worthy of notice. (*United States* v. *Edmonston, ut sup.*) This principle is very pertinent here, and, if the State's contentions are well founded, she may assume entire control of the manufacture of all spirituous, vinous, and malt liquors; of the right to manufacture and sell tobacco in its various forms, de-

priving the Federal Government of its revenue from this source. She may import foreign wines and liquors for sale in her dispensaries and claim immunity from import duties, and import drugs, remedial and poisonous, which she might undertake to sell. On the ground that clothing manufactured in the great cities under objectionable conditions and methods was unhealthful and injurious to her citizens, she might claim to import free foreign woolens and cloths of every description. The field is limitless. And if one State has such rights, then every State in the Union has similar rights, and the result would be that the Federal power of indirect taxation, which is one of the General Government's principal sources of revenue and one of its most essential functions in the original compact between the States, would be shattered and destroyed.

(C) In no just sense is the dispensary system a valid exercise of the police power.

I shall not speak of the side of this matter which involves theories of social science and the proper function of the State. Such considerations are political and economic, not judicial. There is a tendency in recent years to experiment practically with some old theoretical ideas as to the meaning and duty of government. There has been also, no doubt, an increase on sound and legitimate grounds of the activities of the State and restrictions by the State. To a certain degree this is natural, inevitable, and in pursuance of law as real as the laws of the physical universe, and

to that extent the movement is right. But whether right or not, it is in the region of the restrictions rather than the activities that the police power operates, and the question of the fitness and scope of the police power in a given exercise or instance is purely judicial. In short, the police power of government ought to be confined to the detailed enforcement of the maxim, *sic utere tuo ut alienum non loedas;* and tends to exceed its due bounds when founded on the maxim *salus populi suprema lex.*

A State in its sovereign power and municipal capacity, or as a quasi corporation, may, perhaps, have the legal competence and right to engage in ordinary business, unless restrained by its own constitution. But this is not due to its police power, which is confined to imposing restrictions and regulations on individuals and particular kinds of business in the interest of public morals and hygiene, or in freeing production and domestic commerce from private restrictions. *Laissez-faire* is here a just and sane rule. Except to preserve freedom of trade the police regulation of business occupations can not be instituted and enforced consistently with sound principle unless the occupation is harmful in some way to the public. (See Tiedeman on Limitations of the Police Power, sec. 102.) There can be no question of the constitutionality of prohibition laws. The State is the sole and absolute judge whether the liquor traffic is inherently injurious to the health, morals, and welfare of the people. The State may prescribe regulations for pursuits and callings which will promote health,

good order and prosperity, but the pursuit must be free and open to all persons who are qualified under the law and conform to the regulation. The legislature can not determine that a certain business is injurious to the health and morals of the community and then create a monopoly in the State itself to carry on the generally forbidden traffic. This law is entirely unlike those wherein after a declaration that the sale and consumption of liquor is harmful, permits sale in a limited way for certain purposes (medicinal, mechanical, and manufacturing) but prohibits sale as a beverage to everyone. The State, if of opinion that liquors are injurious, may prohibit their sale as a beverage absolutely, or it may restrict and regulate under a high-license system. It can not, under the guise of remedying the evils, forbid citizens to engage in the business and then turn it into a government monopoly. That is not the exercise of legitimate power of police reserved to the States.

The fundamental question was admirably put and answered in *Mugler* v. *Kansas* (123 U. S., 623, 661), from which I quote briefly:

> The courts are not bound by mere forms, nor are they to be misled by mere pretenses. * * * If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

The opinion then examines the prohibition law of Kansas, and declares that government does not impair constitutional rights when it determines that the use of intoxicating drink as a beverage is hurtful to society and constitutes a business in which no one may lawfully engage:

> Those rights are best secured, in our Government, by the observance, upon the part of *all*, of such regulations as are established by competent authority to promote the common good. *No* one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare (p. 663).

The Indiana cases (*supra*) probably would not be followed at this day so far as to declare a law unconstitutional which forbade the manufacture or sale of liquor by any person whatever and allowed the State to sell merely as a medicine. Such a law, as I have indicated, would be practically prohibitory upon all, and as such, notwithstanding the limited exception, would be constitutional. In the Minnesota case (*Rippe* v. *Becker*, *supra*) the court held that a law providing for the maintenance and operation of a grain elevator by the State is not the exercise of police power to regulate the business of warehouse handling of grain. The discussion of the opinion is interesting and helpful on the situation now before this court. The court, referring to various kinds of business, including the liquor business, said:

> If counsel's contention is correct, we do not see why, as a means of regulating these kinds of business, the State itself might not engage in running hacks, pawnbrokers' shops, building and operating distilleries and breweries, *or even running saloons.* But further illustration can not be necessary. The police power of the State to regulate a business does not include the power to engage in carrying it on.

The logical result of the State's argument is that a State might engage in the manufacture and sale of tobacco, deleterious drugs, arms and explosives, and many other forms of mercantile business, because there is scarcely any business which may not be carried on in such manner as to become injurious to the health and morals of the community. For example, it is easy to see that the selling of beef and the canning of goods in some aspects and at some points may call for police restriction. If the legislature has the power to invest the State with a monoply of every trade or mercantile business which may possibly become injurious to the public welfare there will be very little business left in which the citizens of the State could engage on equal terms.

The constitution of South Carolina of 1895 (article 8, sec. 11) contains a declaration of right in the State on the subject of the liquor traffic, its prohibition, regulation, and license, which is the foundation of the statute and contemplates the very system adopted thereunder. But this does not alter the situation. A State can not increase its police powers merely by enumerating large

conceptions of them in its fundamental charter. The limitations of the Federal Constitution and general principles of jurisprudence operate as a check. State police power consists only of such necessary and legitimate instrumentalities of *government* as have not been delegated to the United States and do not conflict with the powers and duty of the Federal Government under the Constitution of the United States. Legitimate police powers have been reserved to the States, but they exist and continue by virtue of the compact in the Federal Union and can not be increased by any constitution which the State may adopt.

(D) To show further that the State liquor system is not in any valid sense an exercise of police power, the public facts of the case are discussed. They reveal that the State has deliberately embarked in a commercial enterprise in reality for the sole object of profit and gain.

What is the real fact here when all the wrappings are removed and mere professions ignored—that the trade is incident to the police regulation, or the police regulation incident to the trade?

The South Carolina statutes on their face show that the system does not purport to be a police regulation of the liquor traffic, but merely a scheme whereby the State realizes the profits of the business instead of private individuals. Careful examination and analysis of the act of 1892, with its principal amendment of 1893 (for the numerous later amendatory acts relate merely to details and do not affect the organic principle), disclose no features of police regulation except these:

That liquor must not be sold in a less quantity than half a pint or greater than 5 gallons; that it may not be drunk upon the dispensary premises; that sales must be made only between sunrise and sunset, and shall not be made to minors or habitual drunkards; that applications for purchase must be made out and signed by the actual purchaser. Most of these are ordinary restrictions everywhere upon private dealers under license systems. As to the necessity of filling out an application for the purchase, I show below that this is merely a dead letter and is not enforced. The law as a police measure can not be defended upon these meager provisions for State regulation and control of the traffic. It is hardly conceivable that the State should have launched upon this vast business enterprise and engaged in the exclusive sale of spirits to enforce such regulations. Manifestly, the chief motive of the State was not the desire to regulate and control the use of spirits as a beverage, but to appropriate the profits of the traffic. This court will look beyond the professions and pretensions of a law to the real substance and ascertain for themselves whether it is really what it purports to be. (*Mugler* v. *Kansas ut sup.*) In whatever language a statute is framed its purpose must be determined by its natural and reasonable effect, and the presumption that it was enacted in good faith and for the purpose expressed in its title does not prevent the court from examining into the real intention and effect. (*Minnesota* v. *Barber*, 136 U. S., 313; *Brimmer* v. *Rebman*, 138 U. S., 78; *Voight* v.

Wright, 141 U. S., 62; *Booth* v. *Illinois*, 184 U. S., 425, 429.)

In the message of Governor Tillman to the South Carolina legislature for the session beginning November 22, 1892 (Reports and Resolutions, S. C., 1892), he speaks of the prohibition sentiment, strong in the country, opposed in the towns. He says little or nothing either directly or by implication of the moral sentiment at the root of adherence to the prohibition cause, but points out that the liquor men make money selling liquor, the towns make money, the county—that is, the country—suffers; the county pays for it and the county has increased taxes for it. He refers to his previous message calling attention to the injustice of allowing the towns to license the nuisance and derive therefrom an income at the expense of the county and State, and urging that all money derived from this source should go into the county and State treasuries.

> When it is known that no benefit will accrue to the towns by the licensing of bar-rooms, public sentiment in them will rise up in arms to suppress the nuisance which increases the municipal taxes, and every man will be more or less interested in seeing the laws enforced. * * * On the other hand, you see that the absolute refusal to license the sale of liquor will cause an increase in the taxes of the counties amounting to one-half mill.

So that in this initiation of the scheme it is evident that it was a mere general license to sell liquor. In accordance with this recommendation, the legislature

appropriated money for purchasing a stock of liquors and engaging in that business by the passage of the first dispensary law. I have already given the title, and the law was an act to prohibit sales except by the dispensary which was established. The division of profits between the city, county, and State was prescribed, and there were stringent provisions regarding liquor brought into the State by any person for the purpose of sale, providing for confiscation and the imposition of a fine and imprisonment (sec. 25). The act of 1893 prohibited the importation of liquor into the State for any purpose (sec. 33). This section, as reenacted in the dispensary law of 1896, with the amendment of 1897, were declared unconstitutional by the Federal court (*Vandercook Co.* v. *Vance*, 80 Fed. Rep., 786). Thereupon importations of liquor became so frequent as to threaten the profit features of the State dispensary establishment. Accordingly, Governor Ellerbe said in his annual message to the assembly at the session beginning January 11, 1898 (Reports and Resolutions, S. C., 1898):

> Judge Simonton has destroyed, along with the dispensary, the license system *when run for profit*. What, then, is left to do? We must either enact prohibition or continue the dispensary system *without the profit feature*. * * * Many have approved the dispensary system *because of the profit feature*. We can certainly get rid of the original-package dealers and their demoralizing traffic by continuing the dispensary shorn of all profits and administered only

> as a police regulation to control and reduce the liquor evil. * * * We might try this policy for a year, and next winter, after Congress shall have acted or failed to act, and after the Supreme Court at Washington shall have decided what is to become of the State's power to control liquor under the Wilson bill of 1890, we shall be in a position to take final action.

It appears to be very clear from this message that the primary and principal purpose of the dispensary as originally established was the profit in money that the State made out of the business. But the message is hopeful, and hence the suggestion that regulation without profit might be tried for a year to see if something would not turn up. If the object of the law was only to control and reduce the liquor evil, then why regard with such concern the loss of the profits? The only legitimate exercise of the police power would have been the passage of an act to control and reduce the evil, and for that purpose only. Since the executive of the State admits that this could be done without the profit features of the dispensary act, then the legitimate function of the law could have been accomplished without the addition of this commercial element.

In *Vance* v. *Vandercook*, 170 U. S., 478 (1898), the State obtained the favorable decision for which the governor was waiting; that is to say, it was decided in view of the amendment of 1897 allowing, under rigorous rules, importation of liquor for personal consumption, that a citizen of the State may import liquor

for his own use, but not for sale after importation. Thus the principal obstacle to the commercial success and profit of the dispensary system was removed and this money-making business of the State has prospered ever since.

It appears that all the governors during this period were ardent supporters of the State's plan to control and profit by the traffic. Thus, Governor Ellerbe says in his message of 1899 (Reports and Resolutions, S. C., 1899):

> The dispensaries have been forced to fight free whisky on terms of absolute equality, yet, strange to say, they have fought it successfully, for while the profits were reduced by this lawless competition, there was still enough business to make the dispensary self-supporting and leave a small margin of profit.

This message states also the view that whisky should not be sold in any county where a majority favor prohibition, and therefore recommends submission of the question to the electors.

> It is both right and just for these counties which have prohibition or may hereafter adopt it * * * to be taxed to enforce such law, nor should they receive any part of the profits arising from the sale of liquor in the other counties to add to their school funds.

In a sense this is a premium on liquor drinking and forcing whisky down the throats of the people with a vengeance. The recommendations of the governor were adopted, and a law was passed by the legislature in conformity with his views.

The State Dispensary Commissioner in his report for the year 1895 (R. & R., 1895, vol. 2, p. 841) complains that some of the subdispensaries located in the smaller towns have been operated through the dull season at a loss to the counties in which they are located, and suggests that steps be taken "to prevent a recurrence of these undesirable results during the coming summer."

In Governor McSweeney's message of 1900 he says that he is unable to obtain the returns of the business for the fiscal year in time for his message, but is informed "that the profits will be much larger than in any previous year since the enactment of the dispensary." In his message for 1902 he states the gross sales, and the net profits of over $500,000, and recommends that the fine imposed for violation of the dispensary law be reduced in order that the State might put a premium upon the payment of the money in place of serving the alternative minimum three months sentence.

The real inspiration of the system and its operations appears to have been cupidity; the results following were natural, and this is one of the manifest dangers when States engage in business. The highest duty is neglected for considerations of profit. The inevitable result of the universal desire of the State officers to make as much money for the State out of the system as possible was to ignore the safeguards of the law and to sell in violation of them.

In Governor McSweeney's message for 1901 he says:

> It has become customary for county dispensers to sell to anyone who applies to purchase without being identified or without signing the application in his own true name and signature and without stating for whom or for whose use it is required.

But this was not strange, for the dispenser's salary and employment depended entirely upon the commercial success of the dispensary. If it was not profitable, or at least did not pay expenses, it was closed up. That was the natural result of the State's engaging in this business—that its own officers would violate and nullify its law. It is notorious that the State permits private individuals to engage in the sale of beer under so-called "beer privileges," upon the payment of a certain royalty to the State. The State does not own the beer and takes no interest in the matter except to collect the royalties. The record shows how indifferent the State is to its professed policy of prohibition and strict regulation, because the finding is that there are 260 private individuals selling liquor as dealers in competition with the State and in flat disobedience of its statutes. (Record, p. 14.) This fact is founded upon official internal-revenue records. It almost seems as if the probability was reckoned with that after all the ready ability to obtain liquor anywhere, even through forbidden agencies, increased the demand and in the long run helped the State policy of profit by the business, more than strict and genuine

enforcement of the prohibitions against sales by private persons. These irregular "inducing" establishments are located as a rule in the neighborhood of dispensaries, and sometimes in the same building, and they are known as "blind tigers." It also seems that the practical immunity to illegal sellers is because they purchase their goods from the State dispensaries. If these are not the reasons why of recent years "blind tigers" flourish, and such irregular selling is not pursued and checked as formerly, when these outside dealers were so ill advised as not to purchase from dispensaries, why, then, is the State lax in prosecutions under its law? The report of the attorney-general of the State for 1901 shows but five instances of the charge of selling liquor in violation of law in the county of the capital (Richland County), where the wholesale establishment of the State and retail dispensaries are located. Each of these cases was dismissed without any trial whatever. In Charleston for the same year the report shows there were 59 cases of selling in violation of law and not one was prosecuted.

So eager was the State for gain that not only did it seek the ordinary profits of the trade as a domestic business and adopt the plan of encouraging fines for violation of the law rather than imprisonment, but it sought to encourage any outside trade, whether with *bona fides* or not may be questioned. The trade-mark case which I have noted (*ante*) shows that the State asked for this special right for its brand of liquors on the ground that it was engaged in foreign commerce, particularly with Canada.

All the foregoing facts are entirely public and notorious; they show beyond doubt that so long as the State finds its profit in current conditions, it is not greatly concerned about enforcing its law. What sort of prohibition does this showing reveal? What conception of police restriction in the interest of public health or morals? It is a great liquor business, pure and simple, in its essential character; it is a money-making enterprise and the agency (it seems) of party politics. Not content with the usual profits of this doubtful traffic or with the money fines for violation of its monopolistic law, which it seeks in preference to enforcing the deterrent punishment of imprisonment, it is now endeavoring to add to its profits by recouping the excise tax which the Federal Government imposes upon this business, legally and justly subject to that burden at all times and on all grounds. This is not an exercise of the police power, and there is no reason whatever in law or morals why the business in the hands of a State should not as justly pay the Federal excise as if it were in private hands under the open competitive conditions of some general license system.

In *Bank of United States* v. *Planters' Bank of Georgia* (9 Wheat., 904) the Chief Justice said (p. 907):

> It is, we think, a sound principle, that when a government becomes a partner in any trading company it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its

> privileges and its prerogatives, it descends to a level with those whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. * * * The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty.

And again, at page 908:

> The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter.

This doctrine was reaffirmed in *Bank of Kentucky* v. *Wister*, 2 Pet., 318, 323; *Briscoe* v. *Bank of Kentucky*, 11 Pet., 323, 324; *Railroad Co.* v. *Letson*, 2 How., 551; *Curran* v. *State of Arkansas*, 15 How., 308. The principle certainly applies to the business transactions of a State, however the business may be conducted—whether the State enters it as a partner, or as a stockholder and member of a corporation, or, as here, alone and by creating an exclusive monopoly. The State has strangely chosen to step down from its sovereignty so far and engage in this business, and must take the consequences.

The opposing brief emphasizes the fact that one of the grounds pointed out by the Supreme Court of South Carolina in the Aiken decision (which the opposing brief quotes at length) for the view that the law was in the interest of good morals and that many safeguards are thrown round the sale of liquor, was the fact that local option was recognized, and a majority of the voters in a township could prevent the establishment of a dispensary (sec. 8, act of 1893), but that section also contains this proviso:

> That nothing in this act contained shall be so construed as to prohibit persons resident in counties which shall elect to have no dispensary from procuring liquors from dispensaries in other counties, or county dispensers from shipping same to their places of residence under proper labels or certificates.

What meaning, then, was there in the right of local option or in such encouragement to prohibition, when the morals of the people could be corrupted, the will of the voters nullified, and the safeguard demolished by easy sales and legal shipments from an adjoining county? In two counties, by the same section of the act of 1893, Williamsburg and Marion, and in Pickens County and incorporated towns in Oconee County, and indeed throughout that county, by the amendment of 1894 (sec. 8, Acts S. C., 1894, p. 727), and by another act of December 18, 1894 (Acts S. C., 1894, p. 1066), the local-option privilege was withdrawn or rendered nugatory. In fact, the numerous additions and modifica-

tions of the law suggest that it was the sport of contending interests and was changed continuously to suit various supposed exigencies, mostly indicating either a desire to enlarge profits or open the door to drink while professing the contrary. For instance, the act of 1894 (acts of 1894, p. 735) and the act of 1896 (acts of 1896, p. 138) permit owners of tourist hotels to sell liquors either night or day if bought at a dispensary, while the act of 1901 (acts of 1901, p. 706) prohibits the distilling of liquor within two miles of any church or public school, but allows distilling in Pickens County to be carried on within one mile of churches and schools.

Opposing counsel make much of the differences between the act of 1892 and the act of 1893. In the first the revenue feature was an integral part of the law, in the second it was subject to such rules as might be prescribed by the State board of control; and the Supreme Court of the State in the Aiken case (decided when the complexion of that court had changed) held that it is within the power of the board of control to eliminate the profit feature altogether. But they have not done so, and the amendment makes no difference in the character of the law and the aspect of the matter before the court. The profits, as the messages of the governors show, have been large and increasing ever since the constitutionality of the law was upheld, and there is little difference between the Court of Claims reference to an "authorized profit of 50 per cent," of which the appellant's brief complains, and the act of

1892 itself which limits the profit of sales to not more than 50 per cent. The act of 1892, which alone makes the specific profit limitation to 50 per cent, contained a limit in fact, viz, that percentage; but under the powers confided to the board of control by the amendment of 1893 the profit might legally be without any limit whatever.

I submit, therefore, that the South Carolina dispensary system is not a valid exercise of police power; that, as the State chooses to embark in the liquor business, it does so with the same consequences and subject to the same liabilities as a private individual or an ordinary corporation, and that the internal taxes collected here were properly exacted. I submit that the claim of the State is without merit and should be denied, and therefore that the judgment of the Court of Claims must be affirmed.

HENRY M. HOYT,
Solicitor-General.

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